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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: NOV 19 2009
SRC 08 245 53256

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the petition is not yet approvable, the AAO will remand the matter for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as the president and chief executive officer of the Council for Trade and Economic Cooperation (USA-CIS), Inc. (CTEC). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner failed to show that her intended position requires either exceptional ability or an advanced degree. The director did not address the petitioner's claim that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel argues that the director based the decision on an inapplicable regulation.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer --

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the petition on August 8, 2008. The director issued no request for evidence or notice of intent to deny the petition. The director denied the petition on July 22, 2009, quoting the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(4)(i):

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor. . . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The director stated that the petitioner had not shown that her intended position “required the alien to have an advanced degree or to have exceptional ability.” The quoted regulation, however, refers to approved labor certifications and other evidence of a specific job offer. Because the petitioner seeks a waiver of the job offer requirement, there is no approved labor certification. Therefore, any requirements concerning the “job offer portion of the individual labor certification” clearly do not apply. 8 C.F.R. § 204.5(k)(4)(i) applies only to petitions with job offers, and not to petitions including applications for the national interest waiver. 8 C.F.R. § 204.5(k)(4)(ii) reads, in full:

Exemption from job offer. The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

In petitions involving a national interest waiver application, 8 C.F.R. § 204.5(k)(4)(ii) applies instead of, rather than in addition to, 8 C.F.R. § 204.5(k)(4)(i).

The petitioner has not claimed exceptional ability in the sciences, arts or business. Therefore, she must establish that she is a member of the professions holding an advanced degree. The petitioner claims an advanced degree (a Ph.D.), and the director has not contested this degree. Holding an advanced degree, however, does not automatically qualify the petitioner as a member of the professions. The term “profession” applies to the occupation rather than to any one person in that occupation. Therefore, the petitioner must show that her intended occupation qualifies as a profession. If it does not, then the petitioner is not a member of the professions, no matter how many degrees she holds.

8 C.F.R. § 204.5(k)(2) defines a “profession” as one of the occupations listed in section 101(a)(32) of the Act (architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries) as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Because the list at section 101(a)(32) of the Act does not list the petitioner’s intended occupation, the petitioner must show that a bachelor’s degree is the minimum requirement for entry into that occupation. We note that the professions listed at section 101(a)(32) of the Act are occupations involving licensure, certification, or similar official processes that ensure workers meet certain minimum requirements. The petitioner, on whom the burden of proof rests, must identify and document the mechanism that prevents an individual without a bachelor’s degree from running a non-profit organization like CTEC.

If an individual without a bachelor’s degree can run a non-profit organization of the type described in the petition, then the occupation is, by definition, not a profession. The director must instruct the petitioner to submit persuasive, objective documentary evidence to show that entry into her occupation

requires at least a bachelor's degree. It cannot suffice for the petitioner to argue that her academic background has prepared her for her occupation, or allowed her to excel at her duties. The standard is not that a bachelor's degree is advisable or recommended, but that it is required.

If an individual with no bachelor's degree can establish a non-profit organization similar to CTEC and appoint himself or herself as its president and chief executive officer, then the petitioner's position is, by definition, not a profession. Again, the issue is not how well such an individual would do in the position, but whether the individual could obtain the position at all. The petitioner must explain and document what would prevent an individual with no bachelor's degree from leading a non-profit organization like CTEC, even if the individual established the organization himself or herself.

We note that, because the regulatory definition of "profession" is an occupation for which a United States bachelor's degree is the minimum requirement for entry into that occupation, it cannot suffice to establish only that CTEC requires its president to hold a bachelor's degree. The presidency of CTEC is not an occupation. Rather, it is one single position within an occupation. Therefore, CTEC's own hiring requirements are not evidence of the requirements for entry into the occupation.

On appeal, counsel refers to "the seemingly self evident appropriateness of an advanced degree as an academic prerequisite for the President of the preeminent organization facilitating trade, investment and scientific technical cooperation between the U.S. and Russia." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The burden is on the petitioner to show that she is a member of the professions, not on USCIS to prove that she is not.

At this time, the AAO takes no position on the questions of whether the petitioner, as an individual, qualifies for the classification sought, or for the national interest waiver. The director must make the initial determinations on those issues. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the petitioner is eligible for the benefit sought. Rather, we remand the matter because the director based the decision on incorrect grounds.

Therefore, the AAO will remand this matter to the director for a new decision. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of the petition within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The petition is therefore remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.